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CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 483

CLIFFORD F. MACEVOY COMPANY AND THE AETNA CASUALTY AND SURETY COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF THE CALVIN TOMKINS COMPANY

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On December 13, 1943, the Court entered an order granting certiorari in this case and inviting the Solicitor General to file a brief *amicus curiae*. This brief is filed pursuant thereto.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 8–14) is reported in 49 F. Supp. 81. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 21–29) is reported in 137 F. (2d) 565.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 13, 1943 (R. 30). A petition for rehearing was denied on September 20, 1943 (R. 43). The petition for a writ of certiorari was filed on November 9, 1943, and granted on December 13, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the Miller Act a Government contractor and his surety are liable under a payment bond to the vendor of his materialman for materials furnished in the prosecution of the work, for which the vendor has not been paid in full.

STATUTES INVOLVED

The pertinent provisions of the Miller Act (Act of August 24, 1935, c. 642, 49 Stat. 793; 40 U. S. C. 270a *et seq.*) and of the Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278) as amended (Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. 270) are printed in the Appendix, *infra*, pp. 17–23.

STATEMENT

The allegations of the complaint filed by respondent in the district court and admitted by petitioners' motion to dismiss are as follows:

On June 3, 1941, petitioner Clifford F. MacEvoy Company entered into a contract with the

United States whereby MacEvoy agreed to furnish the materials and perform the work necessary for the construction of seven hundred dwelling-units on the site of the Government's Defense Housing Project near Linden, New Jersey, on a cost-plus-fixed-fee basis (R. 3–4). Pursuant to the Miller Act (Appendix, *infra*, pp. 17–21), MacEvoy as principal and petitioner Aetna Casualty and Surety Company as surety, executed a bond in the amount of one million dollars, conditioned on the prompt payment by MacEvoy "to all persons supplying labor and material in the prosecution of the work provided for in said contract" (R. 4, 16–17). The bond was duly accepted by the United States (R. 4).

MacEvoy thereafter entered into a contract with James H. Miller & Company whereby the latter agreed to furnish certain building materials for use in the prosecution of the work provided for in MacEvoy's contract (R. 5). Thereafter the respondent, Calvin Tomkins Company, pursuant to an agreement with Miller (R. 11) and with the knowledge and approval of MacEvoy, furnished building materials worth $47,119.14 to Miller for use in the construction of the project (R. 5–6). Miller paid Tomkins only $35,085.65, leaving an unpaid balance of $12,033.49.

Within ninety days from the date on which Tomkins furnished the last of the materials to Miller, Tomkins gave written notice to MacEvoy and the surety of the existence and amount of

Tomkins' claim for materials furnished to Miller. Thereafter, within one year after final settlement of MacEvoy's contract with the United States, Tomkins as use-plaintiff instituted the present action against MacEvoy and the surety on the payment bond (R. 6).

Petitioners moved to dismiss the complaint for failure to state a claim against them (R. 7), and apparently submitted an affidavit stating that MacEvoy had paid Miller in full for all materials and supplies the latter had furnished for the construction of the instant project (R. 18–19). The district court granted the motion to dismiss (R. 15), but the Circuit Court of Appeals reversed that decision (R. 30), and subsequently denied MacEvoy's petition for rehearing (R. 43).

SUMMARY OF ARGUMENT

The proviso in Section 2 (a) of the Miller Act indicates that Congress intended to protect only those who contracted directly with either the prime contractor or his subcontractors, but not to protect more remote claimants. Respondent is, however, within the protected class.

Under the Heard Act, predecessor to the Miller Act, materialmen such as respondent were protected. The Miller Act was intended merely to remove procedural difficulties which hampered claimants under the Heard Act, and not to narrow the scope of the protected class. The purpose of the legislation does not justify the distinction

petitioners seek to draw, because those supplying labor and materials are admittedly protected if their vendee performs labor for the prime contractor in addition to supplying him with materials. No purpose can be seen or has been suggested which would be served by denying recovery to persons identically situated because of the irrelevant circumstance that their vendee does not perform labor for the prime contractor as well as supply materials to him.

No reason exists why respondent's vendee, who contracted to supply materials to the prime contractor, cannot be regarded as a "subcontractor" under the Miller Act since so to regard him is i keeping with the purpose and legislative histo of that Act. That understanding of the word ha been accepted by some state courts under analo gous statutes and is consistent with its literal meaning. While in some usages a "subcontrac-tor" and a "materialman" are mutually exclusive, Congress evidently was using "subcontractor" in its other meaning in the Miller Act.

ARGUMENT

THE TERM "SUBCONTRACTOR" AS USED IN THE PROVISO TO SECTION 2 (a) INCLUDES MATERIALMEN; THEREFORE, ONE SUPPLYING MATERIALS UNDER A CONTRACTUAL RELATIONSHIP WITH A MATERIALMAN HAS A RIGHT OF ACTION UPON THE PAYMENT BOND

The Miller Act requires every contractor for the construction of "any public building or public

work of the United States," where the amount of the contract exceeds $2,000, "to furnish to the United States * * * a payment bond with a surety * * * for the protection of all persons supplying labor and materials in the prosecution of the work provided for in said contract for the use of each such person." (Sec. 1 (a) (2), Appendix, *infra*, pp. 17–18.) Here MacEvoy duly furnished such a payment bond with surety, conditioned as required by the Miller Act (R. 4, 16–17). The Miller Act further provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * and who has not been paid in full therefor" within ninety days after the last labor was performed or material supplied, may bring suit on the payment bond for the unpaid balance (Sec. 2 (a), Appendix, *infra*, pp. 18–19).[1] A proviso then states:

> *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship expressed or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from

[1] Suit must be brought in the name of the United States for the use of the person suing, in the Federal court of the district in which the contract was to be performed, and within a year from final settlement under the contract. (Sec. 2 (b), Appendix, *infra*, pp. 19–20.)

> the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

Our view is that this proviso must be accepted as an indication of the types of relationships which Congress intended to include within the protection of the statute. So construed, the Miller Act protects those who furnish labor and materials under contractual relationship with either the prime contractor or his subcontractors. Properly construed, the Act does not impose on the prime contractor or his surety a liability to see that debts of every remote person who supplied labor or material which ultimately found its way into the project, are duly paid.

This conclusion seems to follow from the fact that the evident purpose of the proviso is to require claimants who do not have direct contractual relationship with the prime contractor and of whose claims the latter and his surety would often be unaware, to give notice of the unpaid claim to the prime contractor, thus giving the latter the opportunity of protecting himself by witholding payment from the subcontractor, and of paying the claim without the compulsion of litigation. This purpose is evident also from

the circumstance that the statute requires no such notice from those having direct contractual relationship with the prime contractor and hence of whose claims the latter and his surety would be aware. We cannot think of any reason, nor has any been suggested by the legislative history, why Congress would have wished the notice requirement to be applicable only to some of the more remote creditors benefited by the Act, and not to all. The conclusion therefore seems warranted that Congress intended to require that all claimants under the Miller Act who did not directly contract with the prime contractor should serve notice on him of their claims prior to suit.

The acceptance of this position does not, however, contrary to petitioners' contention, compel acquiescence in the view that respondent is not within the scope of the Act. While the Act so construed will not benefit respondent unless he "had direct contractual relationship with a subcontractor," we believe the view is justified that respondent had such relationship within the meaning of the Act.

The question turns upon whether Miller, to whom respondent sold the goods and who in turn supplied them to the prime contractor, was a "subcontractor." The prime contractor, MacEvoy, had a contract which required it to obtain, supply, and instan certain materials. MacEvoy contracted with Miller for these materials, and Miller in turn contracted with respondent, who supplied

them. Petitioners argue that respondent's rights depend on whether Miller contracted with MacEvoy to perform some act of labor in connection with the materials which MacEvoy itself was contractually bound to do or have done, and unless Miller agreed to perform some labor as well as supply materials it was not a "subcontractor." We believe that this contention should be rejected; it is not required by the language which Congress used and is inconsistent with the known purpose of the Act.

The Act is designed, as was its predecessor the Heard Act, to protect those whose labor and materials go into public projects. Mechanics' liens are unavailable to protect them where public projects are concerned, so the primary liability for their payment is shifted from the owner to the prime contractor. The Heard Act, enacted in 1894 (28 Stat. 278) and amended in 1905 (33 Stat. 811), was the first such federal act. It applied in favor of "all persons supplying [the contractor] * * * with labor and materials in the prosecution of the work provided for in such contract." It was construed liberally for the benefit of those supplying labor and materials (*Standard Ins. Co.* v. *United States,* 302 U. S. 442, 444), and persons supplying labor and materials to subcontractors without themselves contracting directly with the prime contractor were held entitled to its benefits (*Hill* v. *American Surety Co.,* 200 U. S. 197; *Mankin* v. *Ludowici-*

Celadon Co., 215 U. S. 533; *Utah Construction Co.* v. *United States*, 15 F. (2d) 21 (C. C. A. 9), certiorari denied, 273 U. S. 745).[2] No serious doubt would have existed under the Heard Act that respondent was entitled to the benefits of the statute, for no proviso or other provision existed in it to lay a foundation for an argument that suppliers of material to "materialmen" were not benefited though suppliers of material to "subcontractors" were. Neither the language of the Heard Act nor its broad remedial purpose (*Hill* v. *American Surety Co.*, 200 U. S. 197, 205) would have supported the distinction petitioners now seek to read into the Miller Act, and indeed it has been so held (*Utah Construction Co.* v. *United States, supra*).

Nothing in the reasons which prompted Congress to substitute the Miller Act for the Heard Act supports the existence of the distinction petitioners urge. The Heard Act imposed undesirable procedural limitations on its beneficiaries which the Miller Act was designed to eliminate.

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[2] Examples of the liberal construction applied in determining whether claims were for "labor or materials" are decisions allowing recovery for rental of cars, tracks and equipment (*Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376), railroad transportation of materials for the structure (*Standard Ins. Co.* v. *United States*, 302 U. S. 442), groceries and provisions furnished to the contractor for his use in feeding employees on the job (*Brogan* v. *National Surety Co.*, 246 U. S. 257), and cartage and towage furnished to the contractor (*Title Guaranty and Trust Co.* v. *Crane Co.*, 219 U. S. 24).

The Heard Act provided for a single bond for the protection both of the Government and the suppliers of labor and materials, and to prevent the penalty of the bond from being depleted before the Government could enforce its claims the Government had sole right to sue for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious inconveniences and delays resulted and often the claimants, in sore need of immediate funds, were compelled to settle meritorious claims for less than the full amount. Hearings on H. R. 2068, et al., *Bonds of Contractors on Public Works,* House Committee on the Judiciary, 74th Cong., 1st sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 and S. Rep. No. 1238 (74th Cong., 1st sess.). The Miller Act was designed to meet these difficulties by requiring that the contractor execute two bonds, a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter without waiting for the Government and even without waiting for completion of the project; they are given the right to sue ninety days after their labor was completely performed or materials fully supplied, and each creditor can sue separately.

It is clear from the Committee reports and the discussion thereon in Congress, that the purpose of the Miller Act was not to restrict in any way the coverage of the predecessor Heard Act, but

rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond. See H. Rep. No. 1263, 74th Cong., 1st sess., p. 1; S. Rep. No. 1238, 74th Cong., 1st sess., p. 1; 79 Cong. Rec. 11702, 13382. And indeed this Court has already recognized the applicability of the policy of liberal construction which it followed under the Heard Act to similar questions arising under the Miller Act. *Fleisher Engineering & Const. Co.* v. *United States,* 311 U. S. 15, 17, 18; cf. *United States* v. *Irwin & Leighton,* 316 U. S. 23, 29, 30. It would indeed be incongruous if the Miller Act, which was substituted for the Heard Act to provide greater protection to unpaid creditors, be interpreted as unavailable to a tier of creditors who were not too remote to invoke the Heard Act. There are indications in the Miller Act itself that its coverage was to be no less broad than that of the Heard Act. The Heard Act provided for suit on the bond by "persons supplying *the contractor* with labor or materials"; while the Miller Act provides for suit by "every person who has furnished labor or material in the prosecution of the work provided for in such contract" (see Appendix, *infra,* pp. 18, 22. And as the Heard Act covered persons supplying materials to a materialman who in turn supplied a contractor (see *Mankin* v. *Ludowici-Celadon Co., supra; Utah Construction Co.* v. *United States, supra*), there would

seem little difficulty in reading the Miller Act, intended merely to correct procedural deficiencies in the Heard Act, as covering such persons.

Nothing in the remedial policy of the Miller Act supports a distinction which causes the protection afforded a supplier of labor or materials to depend on whether the intermediate contractor agreed to supply and also install the materials or merely to supply them. Thus, if MacEvoy had contracted with Miller for the latter to supply sashes, doors and frames and the latter had found it advisable to have those materials milled specially by respondent instead of purchasing standard pre-finished articles, under petitioners' position respondent would have no right to recover for either labor or materials because Miller, as petitioners argue, is not a subcontractor but a materialman. But if Miller had agreed to install the sashes, frames and doors as well as supply them, respondent would be able to recover, petitioners concede, because Miller would then be a subcontractor, not a materialman. It seems evident that the policy of the Miller Act refutes rather than supports such a distinction.[8] Re-

[8] Nor does fairness to the prime contractor require such a distinction. He can easily protect himself against assertion of claims owing but unpaid by materialmen in the same manner that he protects himself against claims owing but unpaid by those who petitioners concede are subcontractors: i. e., by contract with all subcontractors, secured by a bond. See *Hill* v. *American Surety Co.*, 200 U. S. 197, 205; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533, 540.

spondent is, we believe, protected in either instance.

The legislative history on which petitioners rely indicates only that the Miller Act was not intended to benefit relationships more remote than respondent's. (Cf. *Utah Construction Co.* v. *United States, supra,* where the protection of the Heard Act was carried one step further.) Petitioner's main reliance is on the contention that the word "subcontractor" excludes "materialman," and hence respondent, who sold to a materialman, is not within the Miller Act. We submit that the meaning of the word "subcontractor" is not so clearly fixed as necessarily to exclude a materialman. State courts have construed "subcontractor" in comparable statutes to include materialmen (*Holt and Bugbee Co.* v. *City of Melrose,* 311 Mass. 424, 41 N. E. (2d) 562; *McNab & Harlin Mfg. Co.* v. *Paterson Bldg. Co.,* 72 N. J. Eq. 929, 67 Atl. 103). It is true that numerous state decisions indorse the contrary view (see Annotation, 141 A. L. R. 321, 324, for a summary of the conflicting cases) but if the word can have either of two meanings the one consistent with the purpose of the statute should

be selected. As there is judicial endorsement of both meanings[4] the conclusion seems warranted that a materialman can be a "subcontractor" where, as here, that construction is consistent with the purpose and sense of the statute.

It has not been suggested that literally a materialman cannot be a "subcontractor," and clearly if literal meaning be sought a materialman is merely a particular type of subcontractor. The contention is made, however, that in the construction business the two words are mutually exclusive. We assume that this usage exists, but there is no indication that Congress knew of it when the Miller Act was enacted. The Hearings (*supra*, p. 11) show that the committee that drafted and reported the bill, the Judiciary Committee, had its customary membership of attorneys, and most of the witnesses before the committee were attorneys. The Procurement Division of the Treasury Department was consulted through its attorneys, who

[4] Not without significance is this Court's interchangeable use of "subcontractor" and "materialman" in referring to one who merely supplied materials, in *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, under the Heard Act.

submitted amendments. The committee bill (H. R. 8519, 74th Cong., 1st sess.) became law without amendment. Accordingly, we submit that it may not be assumed that Congress used words with the peculiar meaning attached to them by the construction business when so to assume would result in giving the statute a meaning its purpose and legislative history show it was not intended to have.[8]

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1944.

[8] That Congress has itself recognized that the term "subcontractor" may, standing alone, include materialmen is to be seen from Sec. 301 (a) (3) of the Act of December 2, 1942 (56 Stat. 1035, 42 U. S. C. Supp. II, § 1651 (a) (3)), explicitly providing that the provisions of the Act shall not apply to employees of a "subcontractor who is engaged exclusively in furnishing materials or supplies."

APPENDIX

THE MILLER ACT

1. The Miller Act (Act of August 24, 1935, c. 642, 49 Stat. 793–794; 40 U. S. C. 270a–270d) provides:

AN ACT REQUIRING CONTRACTS FOR THE CONSTRUCTION, ALTERATION, AND REPAIR OF ANY PUBLIC BUILDING OR PUBLIC WORK OF THE UNITED STATES TO BE ACCOMPANIED BY A PERFORMANCE BOND PROTECTING THE UNITED STATES AND BY AN ADDITIONAL BOND FOR THE PROTECTION OF PERSONS FURNISHING MATERIAL AND LABOR FOR THE CONSTRUCTION, ALTERATION, OR REPAIR OF SAID PUBLIC BUILDINGS OR PUBLIC WORK

SEC. 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work

provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him on material was furnished or supplied by him for which such claim is made, shall have the right to sue

on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States

shall not be liable for the payment of any costs or expenses of any such suit.

SEC. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

SEC. 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

SEC. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act

takes effect, and to persons or bonds in respect of such contracts.

THE HEARD ACT

2. The Heard Act (Act of August 13, 1894, c. 280, 28 Stat. 278) as amended (Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. 270) provided:

> any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed

pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to

all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

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U. S. GOVERNMENT PRINTING OFFICE, 1944

SUPREME COURT OF THE UNITED STATES.

No. 483.—October Term, 1943.

Clifford F. MacEvoy Company and the Aetna Casualty and Surety Company, Petitioners, *vs.* United States of America for the Use and Benefit of the Calvin Tomkins Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 24, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

The United States entered into a contract with the petitioner Clifford F. MacEvoy Company whereby the latter agreed to furnish the materials and to perform the work necessary for the construction of dwelling units of a Defense Housing Project near Linden, New Jersey, on a cost-plus-fixed-fee basis. Pursuant to the Miller Act,[1] MacEvoy as principal and the petitioner Aetna Casualty and Surety Company as surety executed a payment bond in the amount of $1,000,000, conditioned on the prompt payment by MacEvoy "to all persons supplying labor and material in the prosecution of the work provided for in said contract." The bond was duly accepted by the United States.

MacEvoy thereupon purchased from James H. Miller & Company certain building materials for use in the prosecution of the work provided for in MacEvoy's contract with the Government. Miller in turn purchased these materials from the respondent, Calvin Tomkins Company. Miller failed to pay Tomkins a balance of $12,033.49. There is no allegation that Miller agreed to perform or did perform any part of the work on the construction project. Nor is it disputed that MacEvoy paid Miller in full for the materials.

Within ninety days from the date on which Tomkins furnished the last of the materials to Miller, Tomkins gave written notice to MacEvoy and the surety of the existence and amount of Tom-

[1] Act of August 24, 1935, c. 642, 49 Stat. 793; 40 U. S. C. § 270a *et seq.*

kins' claim for materials furnished to Miller. Tomkins as use-plaintiff then instituted this action against MacEvoy and the surety on the payment bond. The District Court granted petitioners' motion to dismiss the complaint for failure to state a claim against them. 49 F. Supp. 81. The Circuit Court of Appeals reversed the judgment. 137 F. 2d 565. We granted certiorari because of a novel and important question presented under the Miller Act. 320 U. S. 733.

Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot.

The Heard Act,[2] which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of "all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract." We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced "the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work." *United States for the Use of Hill* v. *American Surety Co.*, 200 U. S. 197, 204. See also *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, 215 U. S. 533; *United States Fidelity & Guaranty Co.* v. *Bartlett*, 231 U. S. 237; *Brogan* v. *National Surety Co.*, 246 U. S. 257; *Fleishmann Construction Co.* v. *United States to the Use of Forsberg*, 270 U. S. 349; *Standard Accident Insurance Co.* v. *United States for the Use and Benefit of Powell*, 302 U. S. 442. We accordingly held that the phrase "all persons supplying [the contractor] . . . with labor and materials" included not only those furnishing labor and materials directly to the prime contractor but also covered those who contributed labor and materials to subcontractors. *United States for the Use of Hill* v. *American Surety Co.*, *supra*, 204; *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, *supra*, 539; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380. We had no occasion, however, to determine under that Act whether those who merely sold materials to materialmen, who in turn sold them to the prime

[2] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811; 40 U. S. C. § 270.

contractors, were included within the phrase and hence entitled to recover on the penal bond.[3]

The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries.[4] There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond. Section 1(a)(2) of the Miller Act requires every Government contractor, where the amount of the contract exceeds $2,000, to furnish to the United States a payment bond with a surety "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each said person." Section 2(a) further provides that "every person who has furnished labor or material in the prosecution of the work provided for in such contract" and who has not been paid in full therefor within ninety days

[3] In United States for the Use of Hill v. American Surety Co., 200 U. S. 197, 204, we said, "There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for." This broad language, which went beyond that required by the facts and the holding in that case, might seem to justify recovery by persons supplying materials to materialmen. Such was the holding in Utah Construction Co. v. United States, 15 F. 2d 21. Our denial of certiorari in that case, 273 U. S. 745, was not a determination by us of the issue, however. Compare Continental Casualty Co. v. North American Cement Corp., 91 F. 2d 307, expressing the opposite opinion under an identical District of Columbia statute.

[4] Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied. Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong. 1st Sess.; 79 Cong. Rec. 11702, 13382; H. Rep. No. 1263 and S. Rep. No. 1238 (74th Cong., 1st Sess.).

after the last labor was performed or material supplied may bring suit on the payment bond for the unpaid balance. A proviso then states:

"*Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made. . . ."

The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects. *Fleisher Engineering & Construction Co.* v. *United States for the Use and Benefit of Hallenbeck*, 311 U. S. 15, 17, 18; cf. *United States to the Use of Noland Co., Inc.* v. *Irwin*, 316 U. S. 23, 29, 30. But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond is for the protection of "all persons supplying labor and material in the prosecution of the work" and "every person who has furnished labor or material in the prosecution of the work" is given the right to sue on such payment bond. Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships we need not decide. Even if it did include such persons we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of Section 2(a). However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contrac-

tor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act.[5] Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants.

The ultimate question in this case, therefore, is whether Miller, the materialman to whom Tomkins sold the goods and who in turn supplied them to MacEvoy, was a subcontractor within the meaning of the proviso. If he was, Tomkins' direct contractual relationship with him enables Tomkins to recover on MacEvoy's payment bond. If Miller was not a subcontractor, Tomkins stands in too remote a relationship to secure the benefits of the bond.

The Miller Act itself makes no attempt to define the word "subcontractor." We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single, exact meaning.[6] In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor. In that sense Miller was a subcontractor. But under the more technical meaning, as established by usage in the building trades, a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen. To determine which meaning Congress attached to the word in the Miller Act, we must look to the Congressional history of the statute as well as to the practical considerations underlying the Act.

It is apparent from the hearings before the subcommittee of the House Committee on the Judiciary leading to the adoption of the Miller Act that the participants had in mind a clear distinc-

[5] "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." H. Rep. No. 1263 (74th Cong., 1st Sess.), p. 3.

[6] In analogous situations, state and lower federal courts have expressed divergent opinions as to whether the word "subcontractor" includes laborers and materialmen. See annotation in 141 A. L. R. 321 for a summary of the conflicting cases. We have not heretofore had occasion to define the word in this connection. Any loose, interchangeable use of "subcontractor" and "materialman" in any prior decision of ours is without significance.

tion between subcontractors and materialmen. In opening the hearings, Representative Miller, the sponsor of the bill that became the Miller Act, stated in connection with the various proposed bills that "we would like to have the reaction and opinion of members in reference to those bills that deal with the general subject of requiring a bond for the benefit of laborers and materialmen who deal with subcontractors on public works."[7] And the authoritative committee report[8] made numerous references to and distinguished among "laborers, materialmen and subcontractors." Similar uncontradicted statements were made in both houses of Congress when the Act was pending before them.[9] The fact that subcontractors were so consistently distinguished from materialmen and laborers in the course of the formation of the Act is persuasive evidence that the word "subcontractor" was used in the proviso of Section 2(a) in its technical sense so as to exclude materialmen and laborers.[10]

Practical considerations underlying the Act likewise support this conclusion. Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself. The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to

[7] Hearings on H. R. 2068, et al., Bonds of Contractors on Public Works, House Committee on the Judiciary, 74th Cong., 1st Sess., p. 1. See also statements by Rep. Miller, id., pp. 18, 26, 60, 67, 74; Rep. Robsion, p. 30; Rep. McLaughlin, p. 73; Rep. Dockweiler, pp. 12-22; Rep. Celler, pp. 83, 84, 89; Edward H. Cushman, pp. 23-31, 85.

[8] H. Rep. No. 1263 (74th Cong., 1st Sess.), pp. 1, 2.

[9] Rep. Miller stated in the House that "This bill merely provides that in the construction of public buildings and other public works there shall be two bonds, one for the performance of the contract with the Government, and the other a payment bond for the protection of subcontractors and those furnishing the labor and material. Under the present law we have but one bond, with a dual obligation, but it is not satisfactory in that it does not afford protection to the subcontractors, materialmen, and laborers. This merely provides for two bonds, one for the protection of the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers." 79 Cong. Rec. 11702.

Sen. Burke said in the Senate that "This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work." 79 Cong. Rec. 13382.

[10] See, in general, Campbell, "The Protection of Laborers and Materialmen Under Construction Bonds," 3 Univ. of Chicago L. Rev. 1; Annotation, 77 A. L. R. 21.

him. It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors. *United States for the Use of Hill* v. *American Surety Co., supra,* 204; *Mankin* v. *United States for the Use of Ludowici-Celadon Co., supra,* 540. But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer.[11] Many such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative.[12] Here the proviso of Section 2(a) of the Act forbids the imposition of such a risk, thereby foreclosing Tomkins' right to sue on the payment bond.

The judgment of the court below is

Reversed.

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[11] See Note, "The Widening Scope of Protection of Statutory Construction Bonds," 45 Harvard L. Rev. 1236.

[12] Congress has shown its ability in other statutes to make clear an intent to include materialmen within the meaning of the word "subcontractor." See Sec. 301(a)(3) of the Act of Dec. 2, 1942, 56 Stat. 1035, 42 U. S. C. Supp. II, § 1651(a)(3), providing that the provisions of the Act shall not apply to employees of a "subcontractor who is engaged exclusively in furnishing materials or supplies." In other statutes, Congress has clearly used the term "subcontractor" in contrast to "materialman." See 40 U. S. C. § 407(b); 41 U. S. C. § 10b(a) and (b); 41 U. S. C. § 28.